STATE OF MICHIGAN

COURT OF APPEALS

HENRY L. PERRY, as Personal Representative of the Estate of OCTAVIA J. EVANS, Deceased,

Plaintiff-Appellant,

v

CRYSTAL LAKE FINANCE CORPORATION,

Defendant-Appellee,

and

CD & H PROPERTIES, L.L.C.,

Defendant.

UNPUBLISHED
May 27, 2008

No. 277538
Wayne Circuit Court
LC No. 05-513403-NO

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order setting aside a default judgment entered against defendant, Crystal Lake Finance Corporation (Crystal Lake), and an order granting Crystal Lake's motion for summary disposition in this wrongful death case.[1] We affirm.

Plaintiff's decedent died when she jumped from a window in an attempt to escape a fire in an apartment building owned by Crystal Lake. This lawsuit followed. Process was purportedly served on Crystal Lake, a dissolved corporation, on May 17, 2005, through personal service on its president, Malik Jamal Fuqua, by Capital Investigations, Inc. On June 8, 2005, plaintiff moved for entry of a default against Crystal Lake for failure to appear and defend on the matter and a default was entered. Thereafter, on June 24, 2005, a default judgment was entered in the amount of $2,000,000.

[1] CD & H Properties, L.L.C. was summarily dismissed and is not a subject of this appeal thus we refer to Crystal Lake as "defendant" in this opinion.

On July 22, 2005, defendant, through Fuqua, moved in propria persona to set aside the default judgment, arguing that he was not served process and had no notice of the lawsuit until "the motion for entry of default and, therefore, could not respond to the complaint." On August 25, 2005, Fuqua filed an "affidavit" in support of his motion. But defendant failed to appear, either through counsel or Fuqua, at the September 23, 2005, hearing on its motion and the motion was denied with prejudice.

On December 2, 2005, through retained counsel, defendant filed a second motion to set aside the default judgment "pursuant to MCR 2.612," arguing that Fuqua was not served process as indicated by his attached "affidavit," thus establishing good cause for not answering the complaint. Further, defendant argued, Fuqua believed the hearing on his motion to set aside the default judgment was adjourned to allow him time to secure counsel on behalf of both defendants. Defendant also argued that it had a meritorious defense because plaintiff's decedent was a trespasser in the apartment building at the time of her death, as established by the affidavits of Fuqua and Phyllis Scimens,[2] the tenant of the apartment from which the decedent jumped to her death. In response, plaintiff argued that the order entered on September 23, 2005, was a final judgment as indicated by the words "with prejudice." And, plaintiff continued, because defendant failed to move for reconsideration in the trial court and failed to file an appeal of right, the case was closed.

On February 14, 2006, an evidentiary hearing was held "to determine the validity of service of process as impacts the issue of the motion to set aside default judgment." In brief, Fuqua testified that he was not personally served with a summons and complaint related to this lawsuit and, in fact, never received any such documents. He testified that he learned about the default when his mother gave him a package that had come to her business establishment located at 4002 Normanwood. The process server, Kenneth Quisenberry, testified that he went to 4002 Normanwood and knocked on the front door. A female answered the door and he asked for the person listed on the summons and complaint, while pointing out the name to the female. She indicated that the person he was looking for was sitting nearby. Quisenberry indicated that he had to drop off the papers to him and the woman took the papers and handed them to the man. Quisenberry saw the man receive the papers from the woman.

After the testimony, the trial court concluded that the evidence failed to establish that Fuqua was served because Quisenberry did not identify Fuqua, who was in the courtroom, as the man who was served with the summons and complaint. The court indicated to the parties that two issues would be considered at a future hearing: (1) the timeliness of the motion to set aside the default, and (2) whether defendant could establish a meritorious defense. At the subsequent hearing, plaintiff's counsel advised the court that the issue before it was whether defendant could establish a meritorious defense. Defendant argued that whether plaintiff's decedent was a trespasser—as affiants Fuqua and Scimens claimed—or an invitee, as plaintiff claimed, constituted a question of fact. Because plaintiff's decedent's legal status dictated the nature of

[2] Although plaintiff refers to her as "Phyllis Seimens," it appears from her affidavit that her name is "Phyllis Scimens."

the duty of care she was owed, a meritorious defense was established sufficient to set aside the default judgment. Plaintiff argued that even if his decedent was a trespasser she was known to frequent defendant's apartments thus she was owed a reasonable duty of care that defendant did not afford.

The trial court held that a question of fact existed as to whether plaintiff's decedent was rightfully on the premises; therefore, by order entered on April 7, 2006, the default judgment was set aside. Plaintiff sought leave to appeal the order granting the second motion to set aside the default judgment on the grounds that (1) it was not timely filed, and (2) the same alleged good cause and meritorious defense claims were previously rejected by the court when it denied defendant's first motion to set aside. Leave to appeal was denied "for failure persuade the Court of the need for immediate appellate review." *Perry v Crystal Lake Finance Corp*, unpublished order of the Court of Appeals, entered November 27, 2006 (Docket No. 270030).

Thereafter, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact on the issue of plaintiff's decedent's legal status at the time she died on its premises—she was a trespasser. The affidavits of Fuqua and Scimens establish that she was a trespasser. Defendant was only required to refrain from injuring this trespasser by willful and wanton misconduct and no such misconduct could be proved. Plaintiff responded that the affidavits were insufficient to establish that his decedent was a trespasser because the averments were not based on facts but on speculation, were not credible, and conflicted with other evidence.

After hearing oral arguments on the motion, the trial court agreed with defendant. The court noted that the evidence included two affidavits which indicated that the decedent had no right or permission to be on the property at the time of her death. In particular, affiant Scimens, the tenant of the apartment where the decedent jumped out of the window, indicated that she did not know how the decedent got into her apartment and that she did not have permission to be in the apartment. The court concluded that the decedent was a trespasser and that the evidence was insufficient to establish wanton and willful misconduct; therefore, summary disposition was granted in defendant's favor. This appeal followed.

First plaintiff argues that the trial court abused its discretion when it granted defendant's second motion to set aside the default judgment because it was untimely and merely repeated the grounds previously raised and rejected by the trial court. We disagree.

> "The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court. Where there has been a valid exercise of discretion, appellate review is sharply limited. Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside." [*AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).]

Whether the court rules authorize the setting aside of a default judgment under particular circumstances involves a question of law, which this Court considers de novo. *In re KH*, 469

Mich 621, 627-628; 677 NW2d 800 (2004). "A trial court's finding of fact will not be set aside unless it is clearly erroneous." *Nat'l Car Rental v S & D Leasing, Inc*, 89 Mich App 364, 369; 280 NW2d 529 (1979).

Generally, motions to set aside defaults or default judgments may only be granted if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). To satisfy the good cause element, "a party may establish (1) a substantial defect or irregularity in the proceeding upon which the default was based, or (2) a reasonable excuse for failure to comply with the requirements which created the default." *AMCO Builders*, *supra* at 95 (internal quotation omitted). And although defendant failed to file his motion to set aside the default within 21 days after its entry, MCR 2.603(D)(2)(b), MCR 2.603(D)(3) provides that a "court may set aside a default and a default judgment in accordance with MCR 2.612."

In pursuing the second motion to set aside the default judgment, defendant identified MCR 2.612(B)—defendant was not personally notified of the pendency of the action—as the legal basis of its motion.[3] In granting the second motion, the trial court did not specify any particular provision of MCR 2.612, but did find that defendant, through Fuqua, did not receive personal service of the summons and complaint on May 17, 2005. In light of the record facts, we are not left with a definite and firm conviction that the court made a mistake in this regard. See *Nat'l Car Rental*, *supra* at 369. As the court noted, Fuqua denied receiving the summons and complaint, and process server Quisenberry did not identify Fuqua as the individual served. A defect in or failure of notice may constitute a substantial procedural defect that qualifies as good cause to set aside a default judgment. *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 295; 416 NW2d 415 (1987).

Further, we agree with the trial court's conclusion that defendant had presented evidence of a meritorious defense. Fuqua's affidavit provided that the decedent was admonished repeatedly not to enter the premises, and Scimens' affidavit indicated that on the day of the fire the decedent did not have permission to enter her apartment. At least a genuine issue of fact existed as to whether the decedent was trespassing in the building at the time of her death, such that defendant owed the decedent only the duty to refrain from injuring her by willful and wanton misconduct. See *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

Thus, defendant met the requirements for setting aside a default judgment under MCR 2.603(D)(1). But defendant also had to satisfy the requirements of MCR 2.612. See *Alken-Ziegler, Inc*, *supra* at 234 n 7. The requirements of MCR 2.612(B) were satisfied. MCR 2.612(B) provides for relief from judgment when "[a] defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, . . . enter[s] an appearance within 1 year after final judgment, and . . . shows reason justifying relief from the judgment and [that] innocent third persons will not be prejudiced . . . ."

[3] Although defendant merely cited to "MCR 2.612," its primary allegation was that Fuqua was not served on behalf of either defendant consistent with the provisions of MCR 2.612(B).

Here, defendant is a primary "defendant over whom personal jurisdiction was necessary." Personal jurisdiction over defendant was acquired when Fuqua appeared by filing the initial pro per motion to set aside. For some period after plaintiff's commencement of the action, Fuqua lacked actual "knowledge of the pendency of the action." Defendant filed its second motion to set aside approximately five months after the entry of the default judgment, well within the one year requirement. Defendant demonstrated "reason(s) justifying relief from the judgment," specifically the failure of personal service and its possession of a meritorious defense. See *Nat'l Car Rental, supra* at 368. And although plaintiff will endure prejudice from the grant of relief, plaintiff is not an "innocent third person." In summary, the trial court did not clearly abuse its discretion by granting defendant's motion to set aside the $2,000,000 default judgment.

Next plaintiff argues that defendant was not entitled to the grant of summary disposition because defendant's evidence did not conclusively establish that plaintiff's decedent was a trespasser and, even if she was, she was owed a duty of ordinary care. After review de novo, considering the evidence in a light most favorable to plaintiff to determine if a genuine issue of material fact existed, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118, 120-121; 597 NW2d 817 (1999).

Plaintiff first claims that the affidavit signed by Scimens was not admissible evidence and could not be used to support the motion for dismissal because it was not properly dated by the notary. Because plaintiff did not raise this issue in the trial court, it is not properly preserved for our review. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Nevertheless, this issue is without merit because the affidavit was dated and was, at least, in substantial compliance with the essential requirements of MCR 2.119(B), as well as the formal requirements for an affidavit.

Alternatively, plaintiff argues, even if Scimens' affidavit was proper, it did not establish that the decedent was a trespasser because Scimens "clearly lacked personal knowledge of how the Decedent entered the building and apartment." Again we disagree. The decedent jumped to her death from a window inside Scimens' apartment. Scimens averred that on the day of the fire she did not give the decedent permission to be in her apartment, Scimens herself was not in her apartment, and Scimens did not know how the decedent got into her apartment because no one else was in the apartment to let her inside. "A 'trespasser' is a person who enters upon another's land, without the landowner's consent." *Stitt, supra* at 596-597. According to Scimens, the decedent did not have her consent to be in her apartment at the time of the fire and plaintiff failed to rebut that evidence. Although plaintiff argues that the apartment complex was secure and could only be entered with a tenant's permission, such assertion does not tend to establish that the decedent indeed had such permission. Because plaintiff offered nothing but mere allegations and conjecture in an attempt to create a genuine issue of material fact as to the decedent's legal status, the trial court properly concluded that plaintiff's decedent was a trespasser at the time of the fire. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999); *Little v Howard Johnson Co*, 183 Mich App 675, 683; 455 NW2d 390 (1990).

Finally plaintiff argues that, even if his decedent was a trespasser, defendant knew that she frequented the building therefore defendant owed her a duty of ordinary care. We disagree.

Generally a landowner owes no duty to a trespasser but to refrain from injuring her by willful and wanton misconduct. *Stitt*, *supra* at 596. But, "after the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence." *Pippin v Atallah*, 245 Mich App 136, 145; 626 NW2d 911 (2001), quoting *Schmidt v Michigan Coal & Mining Co*, 159 Mich 308, 311-312; 123 NW 1122 (1909).

Here, there is no evidence that defendant was aware, or should have been aware, of the decedent's presence on the premises on the day of the fire or that the purported active negligence occurred after she arrived on the premises. See *Pippin*, *supra*. Therefore, the trial court correctly held that the "willful and wanton misconduct" standard of care applied to plaintiff's decedent and properly granted summary disposition in defendant's favor.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly